

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of Application of )  
 )  
LINDA CHESTER ) File No. 9510564  
 )  
for Authority to Construct and Operate a )  
38.6-40.0 GHz Microwave Radio )  
Service Network in Oxnard, CA )

**MEMORANDUM OPINION AND ORDER**

**Adopted: August 24, 2000**

**Released: September 13, 2000**

By the Commission:

1. The Commission has before it an Application for Review filed by Linda Chester (Chester) on May 1, 2000. Chester requests review of a March 30, 2000, *Order* (March 30<sup>th</sup> Order) by the Public Safety and Private Wireless Division (Division) of the Wireless Telecommunications Bureau.<sup>1</sup> The Division dismissed Chester's September 30, 1999 Request for Reinstatement *Nunc Pro Tunc* and/or Stay of Processing Action regarding the above-captioned application for authorization to provide service in the 38.6-10.0 (39 GHz) band.

2. Chester argues that the mutual exclusivity with GHz Equipment Company, Inc. (GEC) was fully eliminated and resolved by voluntary dismissal of application File No. 9508264 by GEC on December 6, 1995.<sup>2</sup> Chester also argues that the November 13, 1995 deadline for completion of the thirty day statutory protest period for the above referenced application has no rational basis.<sup>3</sup> Finally, Chester argues that the Commission's policy of processing some, but not all, partially mutually exclusive applications is arbitrary and capricious.<sup>4</sup> These issues, however, have been resolved by the Commission in previous proceedings.<sup>5</sup>

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<sup>1</sup> Linda Chester Request for Reinstatement *Nunc Pro Tunc* and/or Stay of Processing Request, *Order*, 15 FCC Rcd 10086 (WTB PSPWD 2000).

<sup>2</sup> Linda Chester Application for Review at 3 (filed May 1, 2000) (Application for Review).

<sup>3</sup> *Id.* at 4.

<sup>4</sup> *Id.* at 5.

<sup>5</sup> See Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, *Report and Order and Second Notice of Proposed Rulemaking*, ET Docket No. 95-183, 12 FCC Rcd 18600, 18639-45 ¶¶ 83-97 (1997); *aff'd* Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, *Memorandum Opinion and Order*, 14 FCC Rcd 12428, 12440-51 ¶¶ 19-44 (1999) (*July 29 MO&O*).

3. The Commission has established and affirmed a processing policy concerning 39 GHz channels that include the dismissal of (a) applications that failed to meet the thirty-day public notice requirement as of November 13, 1995; (b) all new applications, major modification applications and amendments filed on or after November 13, 1995; and (c) applications whose mutual exclusivity was not resolved by December 15, 1995 and amendments resolving mutual exclusivity that were filed on or after December 15, 1995.<sup>6</sup> In addition, the Commission's Rules provide for the dismissal of mutually exclusive applications and late-filed competing applications.<sup>7</sup>

4. The above-referenced application was dismissed because it violated the 39 GHz processing policy. Specifically, the portion of Chester's application that requests frequencies 39850-39900 MHz was dismissed because it was mutually exclusive with application 9508263 filed by GHz Equipment Company, Inc. as of December 15, 1995.<sup>8</sup> In addition, the portion of Chester's application that requests frequencies 39150-39200 MHz was dismissed because it did not meet the thirty day public notice requirement as of November 13, 1995.<sup>9</sup>

5. In the alternative, Chester requests a stay of the March 30<sup>th</sup> Order<sup>10</sup> pending the outcome of related proceedings before the United States Court of Appeals for the District of Columbia.<sup>11</sup> To receive a stay of an administrative action, a party must show that: 1) it will suffer irreparable harm if the stay is not granted, 2) it is likely to prevail on the merits of its appeal, 3) the grant of a stay will not harm other interested parties, and 4) the grant would serve the public interest.<sup>12</sup> Chester argues that a stay of the March 30th Order would serve the public interest by eliminating the need for duplicative litigation and remove uncertainties as to the availability of the subject frequency assignments with respect to the conflicting license rights that may attach as a result of the 39 GHz auction.<sup>13</sup> We disagree.

6. First, the plain language of the test to receive a stay of a Commission action provides that a stay request shall be granted only upon a finding that all four conditions are satisfied.<sup>14</sup> Thus, where any one of the four conditions is not satisfied, the subject stay request will not be granted. Chester fails to address the first three prongs of this test. As a result, Chester cannot satisfy the requirements for a stay.

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<sup>6</sup> See *id.*

<sup>7</sup> See 47 C.F.R. § 21.31 (b)(2)(i) (1995); 47 C.F.R. § 101.45(b)(2)(i) (disposition of mutually exclusive applications). See also 47 C.F.R. § 1.934 (dismissal of defective applications).

<sup>8</sup> Letter from Mary Shultz, Chief, Licensing and Technical Analysis Branch, Public Safety and Private Wireless Division, to Linda Chester (Aug. 27, 1999).

<sup>9</sup> *Id.*

<sup>10</sup> Application for Review at 2, 5.

<sup>11</sup> See *Bachow Communications, Inc. v. FCC*, Case No. 99-1346 (Consolidating Case Nos. 99-1361-1362) (D.C. Cir. 1999).

<sup>12</sup> See *Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 291 (D.C. Cir. 1958), as revised by *Washington Metropolitan Area Transit System v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977).

<sup>13</sup> Application for Review at 6-7.

<sup>14</sup> See *Washington Gas Co. v. FERC*, 758 F.2d 669 (D.C. Cir. 1985).

7. Second, Chester argues that the public interest benefits support the grant of a stay in this matter. Again, we disagree. We are not persuaded that Chester's alleged injuries are sufficient to warrant a stay. In this connection, we note that consolidating this matter with the related proceedings before the court would not be duplicative. Moreover, if Chester wholly prevails in her judicial appeal of the Commission's decision, then we would "forthwith give effect thereto."<sup>15</sup> Finally, we believe that reinstating Chester's application would frustrate the goals underlying the 39 GHz proceeding and "could lead to results inconsistent with our intent . . . to update the regulatory structure of the 39 GHz band in light of contemporary market conditions."<sup>16</sup>

8. In light of the above, we find that Chester has not shown an injury warranting injunctive relief.<sup>17</sup> Accordingly, we deny Chester's request for a stay of the March 30<sup>th</sup> Order.

9. We have analyzed the Application for Review and find that the Commission staff properly decided the matters raised. Therefore, we uphold the staff decision for the reasons stated therein. There is no reason to disturb it.

10. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i) and 5(c)(5) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(c)(5), and Section 1.115(g) of the Commission's Rules, 47 C.F.R. § 1.115(g), the Application for Review filed by Linda Chester on May 1, 2000, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas  
Secretary

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<sup>15</sup> See 47 U.S.C. § 402(h).

<sup>16</sup> *July 29 MO&O*, 14 FCC Rcd at 12437-38; Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, *Memorandum Opinion and Order*, 12 FCC Rcd 2910, 2917 ¶ 15 (1997); Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, *Notice of Proposed Rule Making and Order*, 11 FCC Rcd 4930, 4988-89 ¶¶ 121-124 (1996).

<sup>17</sup> *Washington Gas Co. v. FERC*, 758 F.2d at 669.